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Nos.

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN ZERO AND EDWARD A. CINCOTTA,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOSEPH J. BALLIRO*
JULIANE BALLIRO
of Counsel
20 Beacon Street
Boston, MA 02108
Attorneys for Petitioner John Zero

PAUL T. SMITH
HARVEY R. PETERS
JEFFREY M. SMITH
89 State Street
Boston, MA 02109
Attorneys for Petitioner Edward A. Cincotta

** Counsel of Record*

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Questions Presented

I. Whether the conduct of the prosecutor in improperly mailing a letter and an eight-page document to prospective witnesses which discouraged them from speaking to defense counsel and improperly coached them on how to present their testimony warranted the imposition of a more extreme remedy than instructions to the prospective witnesses on the morning trial began in order to safeguard the petitioners' rights to a fair trial and cross-examination and to deter further such lawlessness on the part of the government. (Copy of letter and document are contained in Appendices B and C).

II. Whether an instruction to the jury with regard to conscious avoidance of knowledge is so prejudicial as to constitute reversible error where,

(A) it fails to address the awareness of a high probability that the acts charged exist; and, (B) it fails to address an actual belief in the truth of the acts charged.

III. Whether the petitioner, Edward A. Cincotta's pervasive involvement in the lawful operations of Mystic was sufficient to permit a rational trier of fact to find, beyond a reasonable doubt, that he knew of and encouraged the conspiracy allegedly involving Mystic and others.

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The petitioners, John Zero and Edward A. Cincotta, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on August 4, 1982.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in Appendix A attached hereto. No opinion was rendered by the District Court for the District of Massachusetts.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on August 4, 1982, and this petition was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. s.1254(1) and Rule 22(2).

Statement of the Case

The petitioners, John Zero and Edward A. Cincotta, were convicted, after a jury trial in the United States District Court, District of Massachusetts (The Honorable W. Arthur Garrity, Jr.) of conspiracy to defraud the United

States in violation of 18 U.S.C. s.371 and several substantive counts of false claims and false statements in violation of 18 U.S.C. ss.287 & 1001.

The United States Court of Appeals for the First Circuit affirmed the convictions, and judgments were entered on August 4, 1982.

Four months prior to the trial of this case, the government prosecutor mailed to prospective government witnesses a letter discouraging communication with the defense and an eight page document entitled "POINTS FOR PROSPECTIVE WITNESSES (Second Version)." The trial judge denied the petitioners' motion for dismissal of the indictments and for disqualification of eleven prospective witnesses

to whom the government's letter and enclosure were addressed, and issued the following Order and Notice of Hearing:

"GARRITY, J.

Upon consideration of defendants' third motion to dismiss and supporting and opposing memoranda, and after hearing oral argument, the court reaffirms its finding in open court that government counsel improperly discouraged communication between prospective witnesses and defense counsel; and also finds that the letters to government witnesses dated September 16, 1980 and the enclosed Points for Prospective Witnesses constituted improper coaching of prospective government witnesses.

Defendants' third motion to dismiss is, however, denied insofar as it seeks outright dismissal of the indictment and disqualification of all prospective witnesses to whom the government's letters and enclosures were addressed. In the court's opinion, defendants' have not shown sufficient particularized prejudice to warrant such severe sanctions, and lesser sanctions are appropriate.

A further hearing as to the proper remedy for the prosecutorial misconduct found to have occurred is hereby scheduled for January 19, 1981 at 3:30 p.m."

On the first day of trial, and over the defendant's repeated objections, the judge instructed the witnesses on voir dire as to the proper relationship of witnesses in the judicial system in general and noted several of the

improprieties in the Government's document in particular. He later specifically advised three witnesses to reconsider their refusal to discuss the case with defense counsel, but after consulting their attorney, they still declined to confer with counsel for the defendants.

At the close of the evidence, the trial judge instructed the jury, over the petitioners' objections, as to the question of conscious avoidance of knowledge. In pertinent part, the judge instructed as follows:

"The word 'willfully' in this context means if done voluntarily and intentionally, and with the specific intent to do something that is forbidden by law, that is to say, with bad purpose either to disobey or to disregard the law.

'Knowingly' in this context means that the act or omission -- here it would be the act -- was done voluntarily and purposefully, and not because of mistake or accident.

Knowledge may be proven by a defendant's conduct and by all of the facts and circumstances surrounding the case. Furthermore, no person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate.

This standard implies a specific intent to avoid the proscription of the law by now determining the accuracy of one's statements. If by such conduct one participates in a scheme to defraud, that person is as guilty of violating the law as a person who is conscious of the nature of his statements."

Reasons for Granting the Writ

1. THE CONDUCT OF THE PROSECUTOR IN IMPROPERLY MAILING A LETTER AND AN EIGHT-PAGE DOCUMENT TO PROSPECTIVE WITNESSES WHICH DISCOURAGED THEM FROM SPEAKING TO DEFENSE COUNSEL AND IMPROPERLY COACHED THEM ON HOW TO PRESENT THEIR TESTIMONY WARRANTED THE IMPOSITION OF A MORE EXTREME REMEDY THAN INSTRUCTIONS TO THE PROSPECTIVE WITNESSES ON THE MORNING TRIAL BEGAN IN ORDER TO SAFEGUARD THE PETITIONERS' RIGHTS TO A FAIR TRIAL AND CROSS-EXAMINATION AND TO DETER FURTHER SUCH LAWLESSNESS ON THE PART OF THE GOVERNMENT.

The opinion of the Court below underscores the need for a definitive statement by this Court on the issue of improper communications between the government and its witnesses. It should be noted at the outset, that the practice of discouraging prospective witnesses from speaking to defense counsel, is apparently a widespread one.

The prosecuting attorney in this case received the eight page document

entitled "22 POINTS FOR PROSPECTIVE WITNESSES (SECOND VERSION)" at a course given by the Attorney General's Advocacy Institute, Department of Justice, Washington, DC, in May of 1980. The document was part of the educational materials relating to trial advocacy which were distributed to at least those in attendance, by staff members of the advocacy institute. An Assistant United States Attorney in the Southern District of New York received the document in question from another United States Attorney in that office. The Southern District of New York was one of the five United States Attorney's Offices that wrote and contributed materials to the Advocacy Institute when it began in 1974.

The Justice Department has not issued any policy statements or guidelines, or any other materials regarding

the use of this document. In the instant case, the document, together with a letter of similar import, was mailed to thirteen prospective witnesses. "The mailing conveyed the implicit and explicit message that the witnesses were partisans enlisted by the prosecution to help win its case, that the defense attorneys were adversaries who would assault their integrity, and that the prosecution if they could do so and still tell the truth." (Infra, Appendix A, page 41).

The insidious effect of this mailing on the petitioners' rights to a fair trial and cross-examination cannot be overstated. The effect on these instructions was to blunt the effectiveness of cross-examination and to deprive the petitioners of their right to a fair trial.

The trial judge found that, "the letter and document were improper for two reasons: they discouraged the witnesses from speaking to defense counsel, thereby denying the defendant's access to them, and they improperly coached the witnesses on how to present their testimony." In its analysis of the issue of prejudice, the court below concluded that, "on the question of denial of access to government witnesses, the appellants have not shown any particularized prejudice from the combination of misconduct and trial court remedy." Citing, United States v. Morrison, 449 U.S. 361 (1981). (Infra, App. pg. 42).

The instant case is clearly distinguishable from Morrison, which dealt with government interference between a defendant and his counsel.

There, the impact of such interference is readily discernible and the remedy more easily tailored to the violation. Here, however, the adverse effects of the government interference are far more subtle and difficult to access, and even more difficult to cure.[1] In Chapman v. California, 386 U.S. 18 (1967), this Court held that "before a constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt" and that the burden of proving that such error. Harrington v. California, 395 U.S. 25 (1969). Thus, the court below improperly placed the burden on the petitioners to demonstrate a particularized prejudice where the

1. For example, as to those witnesses who did speak to the defense before trial, there is no way of knowing if they were as candid as they would have been had they not received the mailing.

government should have borne the burden of demonstrating beyond a reasonable doubt that the constitutional error was harmless.

The court below also concluded that, "The only prejudice that the prosecutorial misconduct could have caused was the instillment of a general attitude of fear and hostility in the witnesses." (Infra, Appendix A pg. 42). The prejudice caused by the mailing was far more extensive and damaging to the petitioners than the "general attitude of fear and hostility" noted by the court below. The document altered witnesses to the theory of the defense, a defense which implicated many of the witnesses who received the mailing in the crimes for which the petitioners were charged. The document had its intended effect of substantially

diffusing the petitioners' defense.

The court below further concluded that, "the trial courts lecture was more than sufficient to correct any improper attitudes before the witnesses took the stand." (Infra, App. A pg 42) However, the court overlooks the fact that the witnesses had almost four months to study this document and prepare themselves to testify in a fashion consistent with the court's written instructions. The judge's admonition on the day before trial, in light of the extensive opportunities of the witnesses to read the document, was likely insufficient to cure the prejudice.[2]

This Court has not had occasion to address itself to the question of

2. Moreover, it should be noted that the Court's instructions were not given to impartial jurors, but to the very persons whose credibility was in issue.

improper communications of this nature between prosecutors and government witnesses. This case demonstrates that there are compelling reasons why some definitive guidelines should now be drawn by this Court. Efforts to create alliances between prosecutors and their witnesses are common if not increasing occurrences, and both litigants and lower courts urgently need the assistance of this Court in understanding the boundaries of this type of communication. Even if this Court should determine that there were no constitutional violations in this case, petitioners respectfully request that this Court invoke its supervisory jurisdiction and delineate guidelines with respect to the issue of communications between the government and its witnesses.

2. AN INSTRUCTION TO THE JURY WITH REGARD TO CONSCIOUS AVOIDANCE OF KNOWLEDGE IS SO PREJUDICIAL AS TO CONSTITUTE REVERSIBLE ERROR WHERE (A) IT FAILS TO ADDRESS THE AWARENESS OF A HIGH PROBABILITY THAT THE ACTS CHARGED EXIST; AND, (B) IT FAILS TO ADDRESS AN ACTUAL BELIEF IN THE TRUTH OF HE ACTS CHARGED.

The petitioners were convicted of (1) conspiring to defraud the United States in violation of 18 U.S.C., s.371, of (2) willfully causing false claims to be made against the United States in violation of 18 U.S.C., ss.2, 28, and of (3) knowingly and willfully making and using false documents in violation of 18 U.S.C., ss.2, 1001.

Willful blindness instructions have been approved in prosecutions under criminal statutes prohibiting "knowing" conduct by this Court. Leary v. United States, 395 U.S. 6 (1969).

Section 2.02(7) of the Model Penal

Code provides:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

In Leary v. United States, 395 U.S. 6, (1969) and in Barnes v. United States, 412 U.S. 837, 845 & n.10 (1973), this Court adopted the Model Penal Code definition in determining the meaning of "knowing." In United States v. Bright, 517 F.2d 584, 586-588 (2nd Cir. 1975), the Second Circuit reversed a conviction because the trial court refused to add to a "deliberate ignorance" instruction the qualification "unless he actually believes it did not exist," found in the Model Penal Code s.2.02(7). Further, the

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3. S. 2.02(7) Article 2 of the American Law Institute Proposed Official Draft of the Model Penal Code (May 4, 1962) ("Model Penal Code").

Ninth Circiut established in United States v. Jewell, 532 F.2d 607, 704 n.21 (9th Cir. 1976), the requirement of the Model Penal Code definition of knowledge in the willful blindness instruction.

There was no reason to reach a different result under the statute involved in this case. In so doing, the First Circuit put itself in direct conflict with the Court of Appeals of several circuits.[4] The decision below has the effect of punishing some individuals for conduct for which others would go free.

The most the First Circuit would say in deference to the position of other circuits was that, "although such language may indeed provide useful clarification,

4. United States v. Jolly, 493 F.2d 672 (2d Cir. 1974); Griego v. United States, 298 F.2d 845 (10th Cir. 1962); United States v. Moser, 509 F.2d 1089 (7th Cir. 1975).

the defendants did not ask for it to be included, and the failure to use it is not plain error." [5] (Infra, App. A p. 40). In United States v. Squires, 440 F.2d 859, 862 (2nd Cir. 1971), the Second Circuit found plain error in the failure to include the balancing language on willful blindness, "although technically it would have been more appropriate for the defense to have made a specific reservation of the issue..."

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5. Subsequent to the instruction, trial counsel stated in his objection as follows:

> "Secondly, your honor, as far as the court's instruction regarding willful blindness I object to that, and I would ask the court to instruct the jury not to consider the willful blindness, that it is not consistent with the governments theory that it was a deliberate thing."

Thus, petitioners contend that there was no waiver of the claim of error for the defense had clearly objected to any instruction inconsistent with the governments theory of deliberateness.

Further, in United States v. Jewell, 532 F.2d 704 n.21 (9th Cir. 1976), the Ninth Circuit, at the very least, implied that a substantial deficiency in the instructions would constitute plain error.[6]

Thus, despite the First Circuits application of the plain error standard to the petitioners, this case is still squarely at odds with the decisions of this Court and other circuit courts of appeal. United States v. Jewell, supra, United States v. Aquires, 440 F.2d 859 (2d Cir. 1971). These conflicts justify the grant of certiorari to review the judgment below.

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6. In Jewell, supra, the court's instruction included the statement that, "the requirement of knowledge would be satisfied, unless the defendant actually believed they were not stolen." (n.11, emphasis supplied) Language to this effect was absent in the instant case, where the deficiencies in the instruction were substantial.

3. THE PETITIONER, EDWARD A. CINCOTTA'S PERVASIVE INVOLVEMENT IN THE LAWFUL OPERATIONS OF MYSTIC WAS SUFFICIENT TO PERMIT A RATIONAL TRIER OF FACT TO FIND, BEYOND A REASONABLE DOUBT, THAT HE KNEW OF AND ENCOURAGED THE CONSPIRACY ALLEGEDLY INVOLVING MYSTIC AND OTHERS.

Petitioner contends that the trial judge erroneously denied his motion for a judgment of acquittal at the close of the government's case as the evidence presented at trial, evaluated in the light most favorable to the government, was not sufficient to permit the jury to find that each element of the offense was proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); In Re Winship, 397 U.S. 358 (1970); United States v. Patterson, 644 F.2d 890, 893 (1st Cir. 1981). "[A] conviction [for conspiracy] cannot be sustained unless the government

*A. refers to Appendix to appellate brief

establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute." United States v. Previte, 648 F.2d 73, 82 (1st Cir. 1981), quoting United States v. Mora, 598 F.2d 682, 683 (1st Cir. 1979). The substantive statutes involved here are 18 U.S.C. ss.287 and 2 (false claims) and 18 U.S.C. ss.1001 and 2 (false statements). With respect to the false claims offense, the indictment charged that the petitioners "willfully caused to be made, and caused to be presented to Fort Devens...a claim...for payment for delivery of number four fuel oil...knowing said claim to be false in that [he] directed truck drivers employed by Mystic Fuel to pick up number four fuel oil [at Union], on the Fort Devens account,...[and] to deliver said fuel oil to its own

customers rather than to Fort Devens." (A. 21-22). As for the false statements offense, the indictment charged that the respondents "willfully and knowingly made and caused to be made false... statements...in that [he] brought and presented, and caused to be brought and presented, to Fort Devens Union Petroleum fuel tickets purporting to represent the delivery of number four fuel oil to Fort Devens, and obtained and caused to be obtained thereon signatures of authorized Fort Devens employees on said fuel tickets, knowing full well that the deliveries represented on said tickets had not been made to Fort Devens." (A. 23).

In his opening statement, the prosecutor told the jury that the evidence would show that the respondents directed Mystic drivers to pick up

number four fuel oil at Union on the Fort Devens account and deliver it instead to customers of Mystic. (A. 139-140, 142). However, the evidence fell far short of the government's expectations.

The Court of Appeals summarized the evidence as follows:

"Although there was no 'smoking gun' that directly demonstrated Cincotta's sponsorship of the fraudulent conspiracy, there was ample circumstantial evidence. The principal source of that evidence was Elaine Kelly, Cincotta's secretary at Mystic. Mrs. Kelly testified that all major decisions at Mystic were made by either Cincotta or Zero. She testified furhter that 'John Zero and Eddie Cincotta talked over everything that was going on...[W]ho eventually made the final

decision I don't know. I would think it would be a mutual thing, or maybe one or the other had a better decision than the other.' She also testified that Cincotta 'made all the rules...for the truck drivers, during the course of the day.' Although Zero normally gave the drivers their instructions regarding deliveries to Fort Devens, Cincotta gave them their instructions in Zero's absence. And although Zero and Cincotta mutually handled all company firing decisions, Cincotta alone signed the corporation's checks, contracts, and bids. Finally, the extent of Cincotta's interest in Mystic's activities is magnified by the fact that his mother and two uncles worked with him in the small company office.

In addition to Mrs. Kelly's testimony there was corroboration in

regard to the Fort Devens fraud in the testimony of other witnesses. Frederick Taubert, the Vice President of Marketing at Union Petroleum, testified that he dealt with either Zero or Cincotta on any issues involving the Fort Devens contract, and that he perceived Cincotta to be in charge of the whole operation of Mystic on a day-to-day basis. Patricia Phelan, the supply clerk and ordering officer at Fort Devens, testified that Zero and Cincotta usually came in together twice a week to have her sign the fuel tickets acknowledging delivery of fuel shipments to Fort Devens. She testified further that on those occasions when another Mystic employee brought in the fuel tickets for her signature, if the tickets did not show to what building the oil had allegedly been delivered she would call

up Zero or Cincotta and they would give her a building number to fill in. And several truck drivers, including Anthony Carpenter and Brian Esterbrook, referred to the due collectively, as 'John or Eddie', 'Zero or Cincotta', in describing the source of their delivery instructions.

As the First Circuit said in Reiss v. United States, 324 F.2d 680, 683 (1st Cir. 1963), "nothing of this, singly or collectively, reflects unfavorably upon the defendant." The evidence does no more than show presumptively innocent actions by the defendant. The subcontract with Union to haul the number four fuel oil to Fort Devens for fiscal 1978 was only a small part of Mystic's business. John Zero was the company dispatcher (A. 270). There was evidence that in John Zero's absence,

the defendant would instruct the drivers as to where to pick up and deliver the oil (A. 271). Seven of Mystic's drivers were called as witnesses by the government. Yet not one driver testified that the defendant had instructed him to pick up oil under the Fort Devens account at Union and deliver it elsewhere. Nor was there any evidence that the defendant was aware that anyone else may have been doing so. There was no evidence that anyone at Fort Devens, or at Union for that matter, ever told the defendant (or anyone else at Mystic) that there was a problem with respect to deliveries of fuel oil to Fort Devens.

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7. John Glencross (A. 605-806); Neal Gooch (A. 519-604); Vincent DiPaola (A. 807-876); Robert Salvato (A. 898-904); Robert Quandt (A. 891-897); Anthony Carpenter (A. 876-891); Brian Esterbrook (A. 1031-1066).

Even though there may have been evidence of a conspiracy, there was no evidence that the defendant was aware of it, much less a part of it. Based upon the evidence presented at trial, any inference to the contrary would be nothing more than impermissible conjecture and surmise. The government must introduce some evidence to link the defendant to the alleged criminal activity. "A defendant, we must remember, is presumed innocent and bears no burden of justifying otherwise legal activity." United States v. Mora, 598 F.2d 682, 684 (1st Cir. 1979). Accordingly, the trial judge erred in denying the petitioners' motion for judgment of acquittal at the close of the government's case.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted:

JOSEPH J. BALLIRO *
20 Beacon Street
Boston, MA 02108
Attorney for Petitioner
John Zero

PAUL T. SMITH
HARVEY R. PETERS
JEFFREY M. SMITH
89 State Street
Boston, MA 02109
Attorney for Petitioner
Edward A. Cincotta

*Counsel of record